

3005

No.

United States
Circuit Court of Appeals,
For the Ninth Circuit.

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation,

Plaintiff in Error.

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corporation,

Defendant in Error.

Transcript of Record.

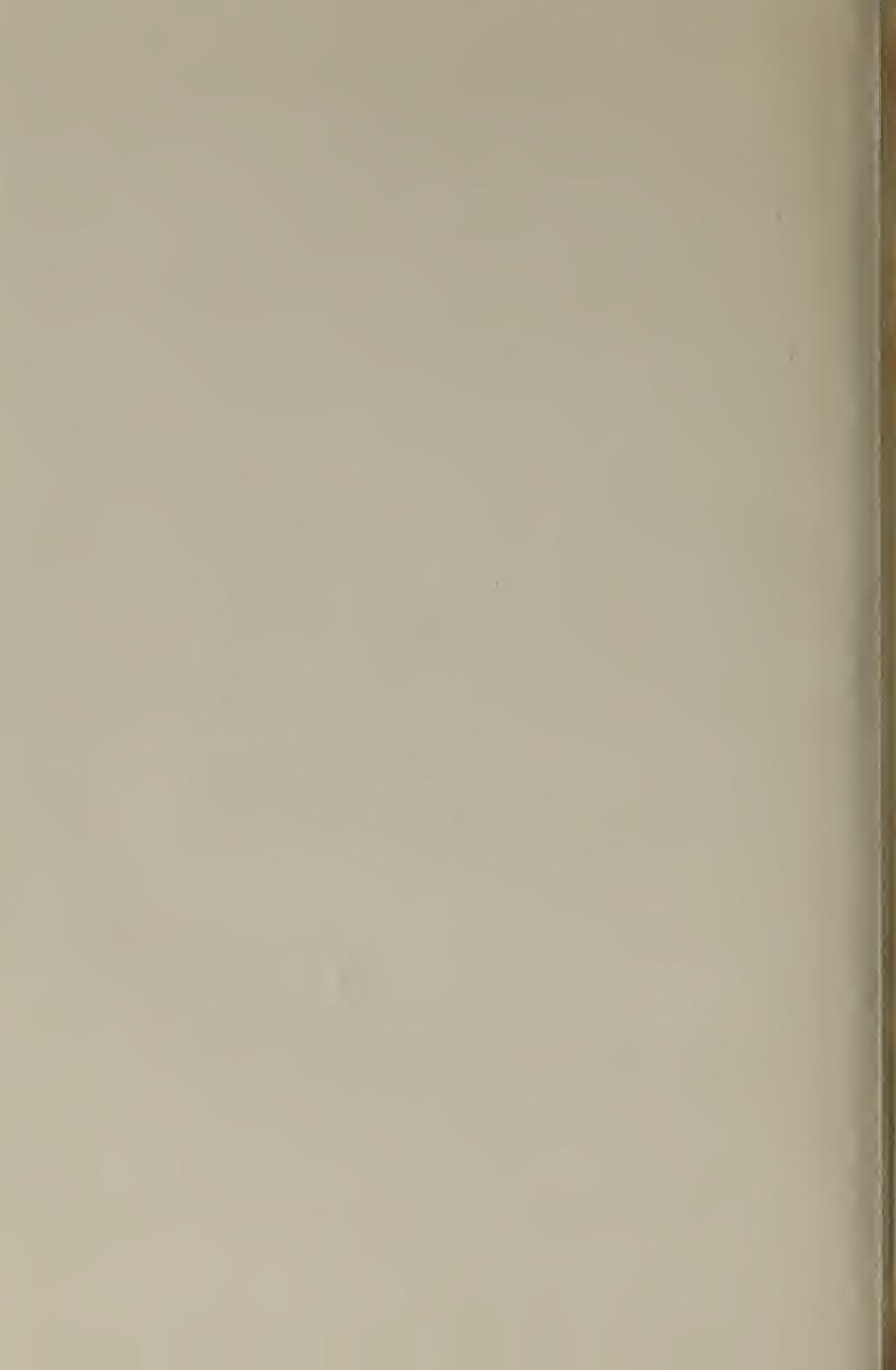
Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

Filed

OCT 1 1917

Parker & Stone Co., Law Printers, 238 New High St. Los Angeles, Cal.

R. D. Monckton,
Clerk.



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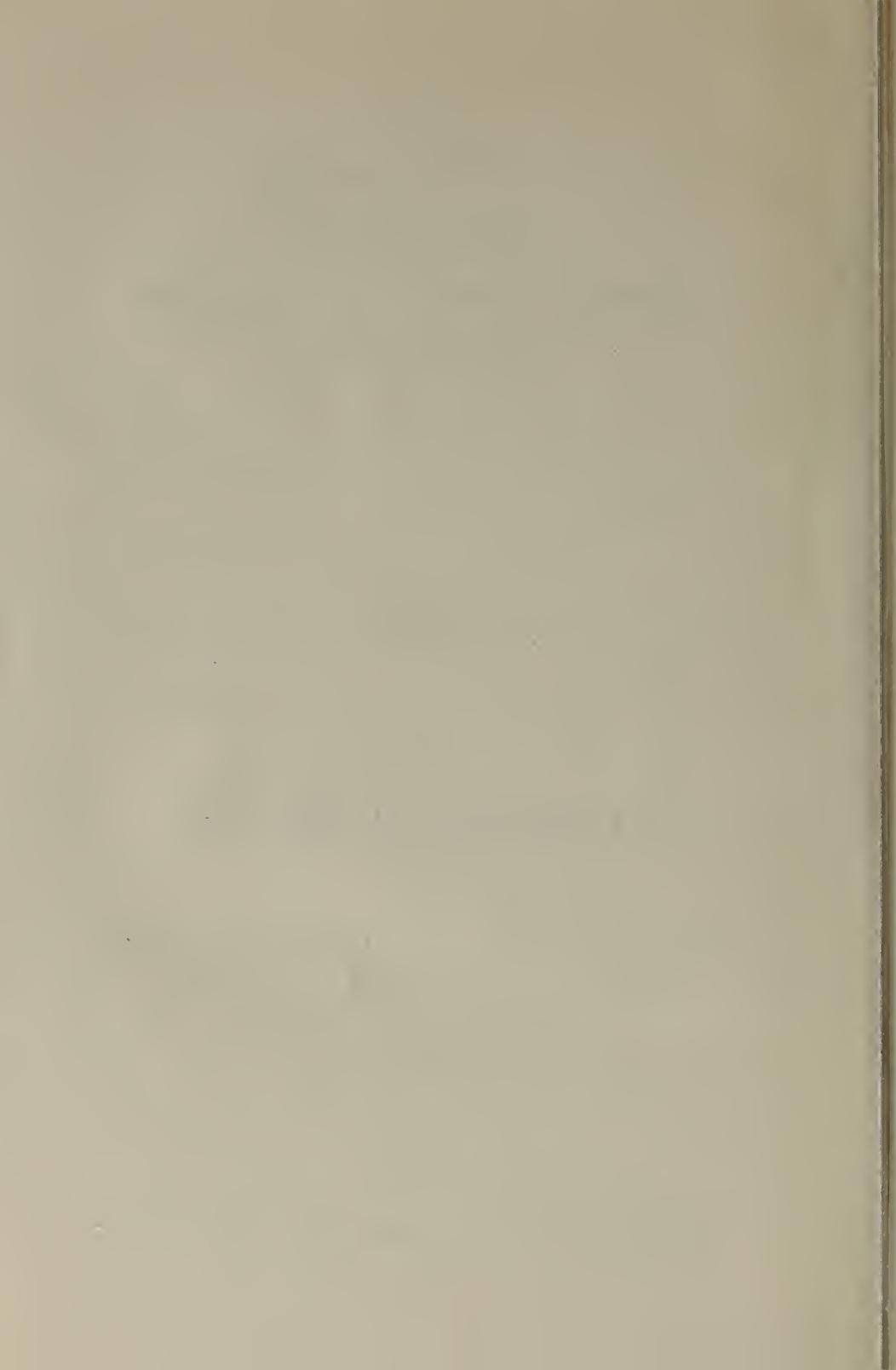
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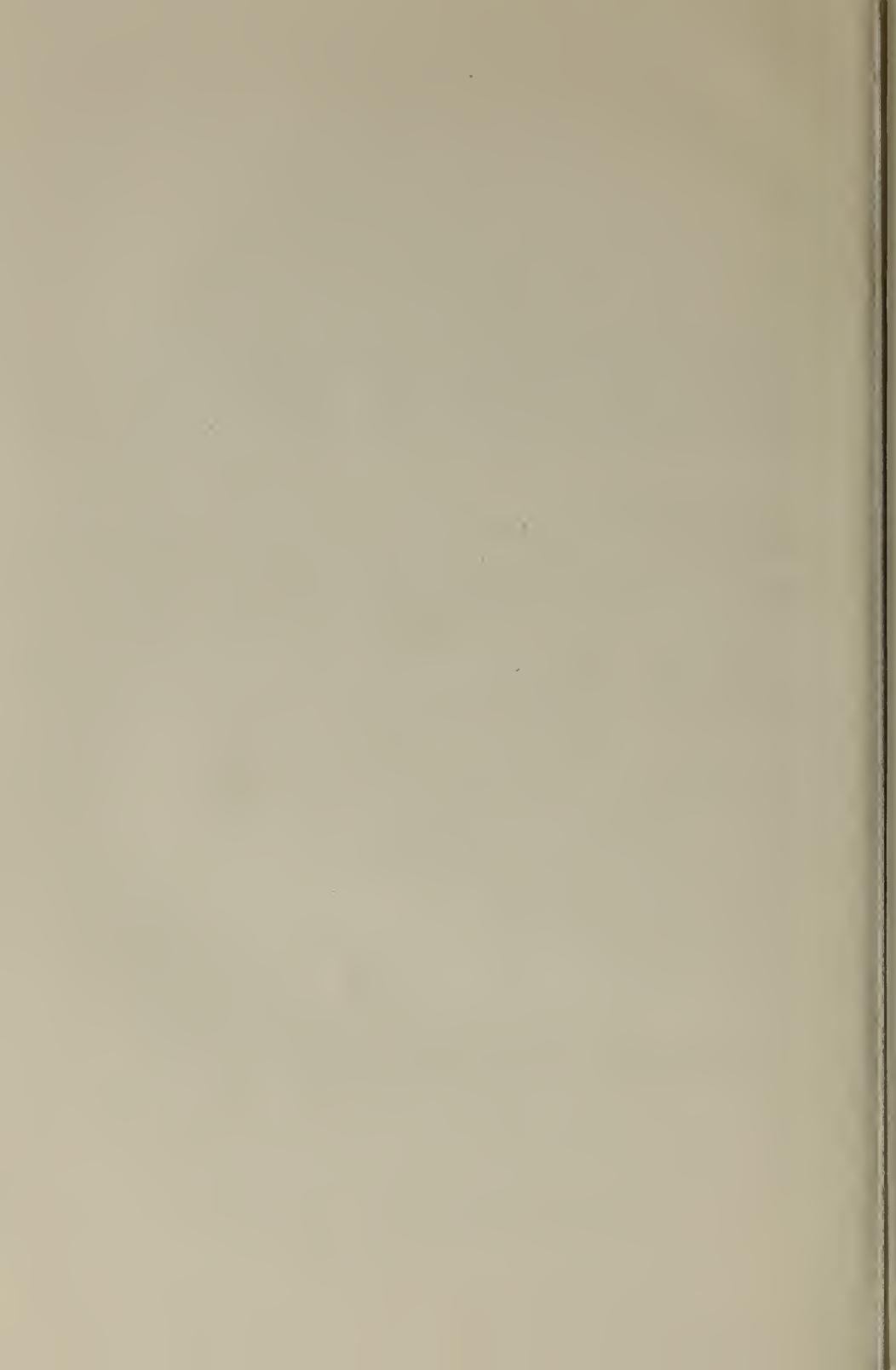
Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For Plaintiff and Appellant:

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For Defendant and Appellee:

WARD CHAPMAN, L. M. CHAPMAN, Esqs.,
B. F. Coulter Building, Los Angeles, California.

*In the District Court of the United States, Southern
District of California, Southern Division.*

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corporation,

Defendant.

No. 543 Civil.

Citation on Writ of Error.

United States of America, to Mutual Orange Distributors, a Corporation, Defendant in Error,
Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, state of California, thirty (30) days from and after the day this citation bears date, pursuant to the writ of error filed in the clerk's office of the United States District Court for the Southern District of California, Southern Division, sitting at Los Angeles, wherein The New York Central Railroad Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Oscar A. Trippet, judge of

the United States District Court, this 3d day of August, 1917.

OSCAR A. TRIPPET,
United States District Judge.

[Endorsed]: Original. No. 543 Civil. In the District Court of the United States in and for the Southern District of California, Southern Division. The New York Central R. R. Co., a corporation, plaintiff, vs. Mutual Orange Distributors, a corporation, defendant. Citation on writ of error. Received copy of the within citation this 3rd day of August, 1917. Ward Chapman, L. M. Chapman, attorney for defendant. Filed Aug. 3, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. E. W. Camp, Paul Burks, U. T. Clotfelter, M. W. Reed, Robert Brennan, Kerckhoff Building, Los Angeles, California, telephone: Main 2980, attorneys for plaintiff.

In the District Court of the United States, Southern District of California, Southern Division.

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corporation,

Defendant.

No. 543 Civil.

Writ of Error.

United States of America—ss.

The President of the United States, to the Hon. Oscar A. Trippet, Judge of the United States District Court for the Southern District of California, Southern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between The New York Central Railroad Company, a corporation, plaintiff in error, and Mutual Orange Distributors, a corporation, defendant in error, a manifest error hath happened, to the damage of The New York Central Railroad Company, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the state of California, where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief

Justice of the United States, this 3d day of August, 1917.

(Seal) WM. M. VAN DYKE,
Clerk of the United States District Court for the
Southern District of California, Southern Di-
vision.

By CHAS. N. WILLIAMS,
Deputy Clerk.

Allowed this 3rd day of August, 1917.

OSCAR A. TRIPPET,
United States Judge.

I hereby certify that a copy of the within writ was on the 3rd day of August, 1917, lodged in the clerk's office of the said United States District Court for the Southern District of California, Southern Division, for the said defendant in error.

WM. M. VAN DYKE,
Clerk of the United States District Court for the
Southern District of California, Southern Di-
vision.

By CHAS. N. WILLIAMS,
Deputy Clerk.

[Endorsed]: Original. No. 543 Civil. In the District Court of the United States in and for the Southern District of California, Southern Division. The New York Central R. R. Co., a corporation, plaintiff, vs. Mutual Orange Distributors, a corporation, defendant. Writ of error. Filed Aug. 3, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. E. W. Camp, Paul Burks, U. T. Clotfelter, M. W. Reed, Robert Brennan, Kerckhoff Building,

Los Angeles, California, telephone: Main 2980, attorneys for plaintiff.

In the District Court of the United States, Southern District of California, Southern Division.

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corporation,

Defendant.

No. 543 Civ.

Complaint.

Plaintiff complains of defendant, and for cause of action alleges:

I.

That plaintiff is now and was at all times herein mentioned a corporation, duly organized under the laws of the state of New York, for the carriage of freight and passengers as a common carrier for hire over and by means of a line of railway extending from, among other places, Buffalo to New York City, in said state, and with respect to the shipment of oranges, hereinafter mentioned, was a connecting carrier of The Atchison, Topeka and Santa Fe Railway Company, a corporation.

II.

That defendant was at all times herein mentioned a corporation, duly organized and existing under and by virtue of the laws of the state of California.

III.

That on or about the 23rd day of January, 1913, the defendant, pursuant to a written contract, a copy whereof is hereto attached, marked Exhibit "A," hereby referred to and made a part hereof, transported over the lines of The Atchison, Topeka and Santa Fe Railway Company, a shipment of oranges consisting of 384 boxes of oranges, weighing approximately 27,648 pounds; that by the terms of said contract said oranges were to be transported to Kansas City, Missouri; that after said oranges had been consigned and received by said railway company for transportation, the defendant reconsigned said shipment and property to Wichita, Kansas; that the defendant, at the time of the making of said contract, agreed to pay the freight charges legally due therefor; that The Atchison, Topeka and Santa Fe Railway Company, the initial carrier named in said contract, agreed for itself and connecting lines of railway to transport said shipment of oranges; that on or about said 23rd day of January, 1913, defendant delivered to The Atchison, Topeka and Santa Fe Railway Company at Cucamonga, California, for shipment over its said line of railway to Kansas City, Missouri, pursuant to the terms of said contract, said 384 boxes of oranges; that thereafter defendant reconsigned said shipment to Wichita, Kansas.

IV.

That The Atchison, Topeka and Santa Fe Railway Company, in the course of its business as a common carrier, received said shipment, and said company and its connecting lines, within a reasonable time there-

after, transported said shipment to Wichita, Kansas, and to the other points hereinafter mentioned, and upon the arrival of said shipment at Wichita, Kansas, on or about January 29th, 1913, tendered said shipment and property to the defendant; thereafter defendant reconsigned said shipment, on or about February, 5th, 1913, to Des Moines, Iowa, and there, on or about February 11th, 1913, said shipment was tendered to the defendant; thereafter defendant reconsigned said shipment, on or about February 15th, 1913, to Clinton, Iowa; that said shipment was, upon arrival at said Clinton, Iowa, reconsigned by defendant to Grand Rapids, Michigan, where said shipment was again tendered and offered for delivery to defendant on or about February 24th, 1913; thereafter defendant reconsigned said shipment, on or about February 27th, 1913, to Detroit, Michigan, where said shipment was tendered and offered for delivery to defendant on or about March 3rd, 1913; thereafter defendant reconsigned said shipment, on or about the 8th day of March, 1913, to Buffalo, New York; that upon the arrival of said shipment at said Buffalo, New York, defendant, on or about March 11th, 1913, again ordered and reconsigned said shipment to Albany, New York.

That the plaintiff, in the course of its business as such common carrier, and as a connecting line for The Atchison, Topeka and Santa Fe Railway Company, and its other connecting lines, received said shipment at said Buffalo, New York, on or about March 11th, 1913, and within a reasonable time thereafter transported said shipment to Albany, New York;

that said shipment was upon arrival at said Albany, New York, reconsigned by defendant to New York City, where said shipment was, on or about the 24th day of March, 1913, placed for delivery at Duane street, in the city of New York, where, upon inspection, it was discovered that said oranges were unfit for human consumption, and thereupon the board of health of the city of New York condemned the entire shipment of oranges and ordered said oranges destroyed.

V.

Plaintiff further shows to the court that under and in accordance with the terms of said contract, and under and in accordance with the tariffs and classifications applicable thereto, and in force and effect and on file with the Interstate Commerce Commission at the time of the receipt of transportation of said shipment, the freight, refrigeration, car service charges and other lawful expenses for the transportation thereof by plaintiff and said connecting carriers legally due upon said shipment were and are the sum of \$401.27, itemized as follows:

Freight from Cucamonga to Chicago,	\$238.46
Car service at Wichita,	5.00
Car service at Des Moines,	2.00
Freight from Chicago to Grand Rapids,	6.91
Car service at Grand Rapids,	1.00
Freight from Grand Rapids to Detroit,	16.87
Car service at Detroit,	4.00
Freight from Detroit to Buffalo,	26.71
Freight from Buffalo to Weehawken, N. J.,	29.00
Car service at Albany,	1.00

Reconsigning charge at Buffalo,	3.00
Freight from Weehawken, N. J., to Duane	
street, New York City,	15.00
Charge for dumping shipment,	52.32
<hr/>	

Total \$401.27

which said total amount, under the constitution and laws of the United States, the plaintiff was and is bound to collect, and which said amount is justly due the plaintiff from the defendant, but defendant has refused and still refuses to pay the same, or any part thereof, although often requested so to do; that under and in accordance with the terms and provisions of an Act of Congress approved February 4th, 1887, entitled "An Act to Regulate Commerce," and acts amendatory thereof and supplemental thereto, there is now due, owing, and unpaid by defendant to plaintiff said sum of \$401.27.

Wherefore, plaintiff prays judgment against defendant for the sum of \$401.27, with interest thereon, and costs of suit.

E. W. CAMP,
U. T. CLOTFELTER,
ROBERT BRENNAN,
Attorneys for Plaintiff.

EXHIBIT "A."

Form 18 Regular

Uniform Bill of Lading—Standard Form of Straight Bill of Lading Approved by the Interstate Commerce Commission by Order No. 787, of June 27, 1908.

The Atchison, Topeka & Santa Fe Railway Company

Coast Lines

Straight Bill of Lading—Original—Not Negotiable

Shipper's No.
Agent's No.

Received, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading, at Cucamonga, Calif., Jan. 23rd, 1913, from Mutual Orange Distributor the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as, to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions,

whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from

is in cents per 100 Lbs.						IF Special per _____	IF Special per _____
IF 1st Class	IF 2d Class	IF 3rd Class	IF 4th Class	IF 5th Class	IF A Class		
IF _____ Times 1st							

(Mail Address—Not for purposes of Delivery.)

Consigned to James A. Coogan
Destination Kansas City, State of Mo. County of
Route S Fe Car Initial S F R D Car No. 4712

NO. PACKAGES	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN

stamp here, "To be
Prepaid."

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Stand Vent

Received \$..... to apply in prepayment of the charges

Note on Way Bill

Permit inspection without bill lading
Deliver without bill lading on written order of Mutual Orange Distributor's Agent.

(Stamped thereon the following:
THIS CAR UNDER VENTILATION. Put in ICE PLUGS and close hatches when the temperature falls below FREEZING. Open hatches and take out ICE PLUGS immediately the TEMPERATURE RISES ABOVE FREEZING.

on the property described hereon.

..... Agent or Cashier.
Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:
\$.....

Mutual Orange Distributor Shipper. Agent.
Per B. A. C.

(This bill of lading is to be signed by the shipper and agent of the carrier issuing same.)

CONDITIONS.

Section 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall

be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed

upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade, without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in a car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

Sec. 6. No carrier will carry or be liable in any way for any document, specie, or for any articles of ex-

traordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any

vessel carrying any or all of the property herein described shall have the liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors, and the liability for such lighterage shall be governed by the other sections of this instrument.

Sec. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an endorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

[Endorsed]: No. 543 Civ. In the District Court of the United States in and for the Southern District of California, Southern Division. New York Central Railroad Company, a corporation, plaintiff, vs. Mutual Orange Distributors, a corporation, defendant. Complaint. Filed Jan. 20, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. E. W. Camp, Paul Burks, U. T. Clotfelter, M. W. Reed, Robert Brennan, Kerckhoff Building, Los Angeles, California, telephone: Main 2980, attorneys for plaintiff.

United States of America, District Court of the United States, Southern District of California, Southern Division.

THE NEW YORK CENTRAL RAILROAD COMPANY, a corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a corporation,

Defendant.

Action brought in the said District Court and the complaint filed in the office of the clerk of said District Court, in the city of Los Angeles, county of Los Angeles, state of California.

Summons.

The President of the United States of America,
Greeting:

To the Mutual Orange Distributors, a corporation.

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the District Court of the United States, in and for the Southern District of California, Southern Division, and to file your plea, answer or demurrer, to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the clerk of said court, in the city of Los Angeles, county of Los Angeles, within twenty days after the service on you of this summons, or judgment by default will be taken against you, and you are hereby notified that unless you appear and plead, answer or demur, as herein required, the plaintiff will take judgment for any

money or damages demanded in the complaint as arising from contract or will apply to the court for any further relief demanded in the complaint.

Witness the Honorable Benjamin F. Bledsoe, judge of the District Court of the United States, in and for the Southern District of California, this 20th day of January, in the year of our Lord one thousand nine hundred and seventeen, and of our independence the one hundred and forty-first.

(Seal)

WM. M. VAN DYKE,

Clerk.

By R. S. ZIMMERMAN,

Deputy Clerk.

[Received 10-45 a. m. Jan. 22, 1917. U. S. marshal's office, Los Angeles, Cal.]

Return on Service of Writ.

United States of America, Sou. District of Cal.—ss.

I hereby certify and return that I served the annexed summons & complaint on the therein-named Mutual Orange Distributors, a corp., by handing to and leaving a true and correct copy thereof with A. B. Cowgill, secretary of the Mutual Orange Distributors, a corp., personally at Redlands, Cal., in said district, on the 31st day of January, A. D. 1917.

C. T. WALTON,

U. S. Marshal.

By BASSETT,

Deputy.

[Endorsed]: Marshal's Civil Docket No. 3241.]

No. 543 Civil. U. S. District Court, Southern District

of California, Southern Division. The New York Central Railroad *Building*, a corporation, vs. Mutual Orange Distributors, a corporation. Summons. Filed Feb. 2, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Com. L. R. B. 367. A. B. Cowgill, Sec. Mutual Orange Dist. 1/31/17. E. W. Camp, U. T. Clotfelter, Robert Brennan, plaintiff's attorney.

In the District Court of the United States, Southern District of California, Southern Division.

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corporation,

Defendant.

No. 543 Civil.

Demurrer to Complaint.

Now comes the defendant in the above-entitled action, and demurs to the complaint herein upon the following grounds, to-wit:

I.

That said complaint does not state facts sufficient to constitute a cause of action against the defendant.

II.

That the above-entitled court has no jurisdiction of this cause for the reason that no federal question is involved, nor is there such diverse citizenship as to give the court jurisdiction.

III.

That said complaint is uncertain in this, that it cannot be ascertained whether or not it is claimed that the defendant contracted to pay the freight and other charges sought to be recovered, by an express contract in writing, or whether it is claimed that said promise arose out of a parol agreement or by operation of law.

IV.

Said complaint is also uncertain in this, that it cannot be ascertained therefrom to whom it is claimed that defendant agreed to pay the freight charges on said shipment.

V.

Said complaint is uncertain in this, that it cannot be ascertained therefrom with whom it is claimed defendant contracted both for the shipment of the goods and the payment of freight.

VI.

That the cause of action set forth in said complaint is barred by the provision of subdivision 1 of section 338 of the Code of Civil Procedure of the state of California, and also by the provisions of subdivision 1 of section 339 of said code.

Wherefore, defendant prays that this action be dismissed, and that defendant recover its costs.

WARD CHAPMAN,

L. M. CHAPMAN,

Attorneys for Defendant.

[Endorsed]: Original. No. 543 Civil. Dept. . . In the U. S. District Court, Southern District of California, Southern Division. The New York Central Railroad Company, a corporation, plaintiff, vs. Mutual Orange

Distributors, a corporation, defendant. Demurrer to complaint. Received copy of the within this 20 day of E. W. Camp, U. T. Clotfelter, Robert Brennan, attorney for plaintiff. Filed Feb. 20, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Ward Chapman, L. M. Chapman, 321 B. F. Coulter Building, 213 S. Broadway, Los Angeles, Cal., attorneys for defendant.

Minute Order.

At a stated term, to-wit: the July term, A. D. 1917, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Monday, the sixteenth day of July, in the year of our Lord one thousand nine hundred and seventeen.

Present: The Honorable Oscar A. Trippet, District Judge.

NEW YORK CENTRAL RAILROAD COMPANY,
Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS,

Defendant.

No. 543 Civil, S. D. (T)

This cause having heretofore been submitted to the court for its consideration and decision on defendant's demurrer to plaintiff's complaint; the court, having duly considered the same and being fully advised in the premises, now announces its conclusions thereon, and it is accordingly ordered that the said demurrer

of defendant to the plaintiff's complaint be, and the same hereby is sustained, without leave to amend said complaint, and it is further ordered that a judgment of dismissal be entered herein, to which ruling of the court, on application on behalf of plaintiff and by direction of the court, exceptions are hereby noted herein on behalf of said plaintiff.

[Endorsed]: No. 543 Civil (T). United States District Court, Southern District of California, Southern Division. New York Central Railroad Company, plaintiff, vs. Mutual Orange Distributors, defendant. Copy of minute order of July 16, 1917. Filed Jul. 21, 1917. Wm. M. Van Dyke, clerk; Geo. W. Fenimore, deputy.

United States of America, District Court of the United States, Southern District of California, Southern Division.

THE NEW YORK CENTRAL RAILROAD COMPANY, a corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a corporation,

Defendant.

No. 543 Civil.

2 Jud. Reg. 427.

Judgment.

This cause came on regularly for hearing on Monday, the 23rd day of April, 1917, being a day in the January term, A. D. 1917, of the District Court of the United

States of America, in and for the Southern District of California, Southern Division, before the court, on defendant's demurrer to the complaint herein, and after argument by counsel for both parties, the same was ordered submitted to the court for its consideration and decision, and thereafter, to-wit: on Monday, the 16th day of July, 1917, being a day in the July term, A. D. 1917, the court having duly considered the matter and being fully advised in the premises, now announces its conclusions thereon, and orders that the demurrer of defendant to the complaint herein be, and the same hereby is, sustained, without leave to plaintiff to amend the complaint, and that judgment of dismissal be entered herein.

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged by the court that the plaintiff, New York Central Railroad Company, a corporation, take nothing by this, its action, and that the defendant herein, Mutual Orange Distributors, a corporation, go hereof without day; and that said defendant do have and recover of and from said plaintiff, its, said defendants', costs herein taxed at \$14.70.

Judgment rendered, July 21st, 1917.

WM. M. VAN DYKE, Clerk.

By GEO. W. FENIMORE,

Deputy Clerk.

[Endorsed]: No. 543 Civil. United States District Court, Southern District of California, Southern Division. The New York Central Railroad Company, a corporation, plaintiff, vs. Mutual Orange Distributors, a corporation, defendant. Copy of judgment. Filed

Jul. 21, 1917. Wm. M. Van Dyke, clerk; Geo. W. Fenimore, deputy.

*In the District Court of the United States in and for
the Southern District of California, Southern Di-
vision.*

THE NEW YORK CENTRAL RAILROAD COM-
PANY, a Corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corpora-
tion,

Defendant.

No. 543 Civil.

I, Wm. M. Van Dyke, clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of an original judgment entered in the above-entitled action, and record in judgment book No. 2, at page 427 thereof; and I further certify that the papers hereto annexed constitute the judgment roll in said action.

Attest my hand and the seal of said District Court, this 21st day of July, A. D. 1917.

(Seal)

WM. M. VAN DYKE,

Clerk.

By GEO. W. FENIMORE,

Deputy Clerk.

[Endorsed]: No. 543 Civil. In the District Court of the United States for the Southern District of California, Southern Division. The New York R. R. Co., a corp., vs. Mutual Orange Distributors, a corp.

Judgment roll. Filed July 21st, 1917. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy clerk. Recorded Jud. Reg. book No. 2, page 427.

In the District Court of the United States, for the Southern District of California, Southern Division.

NEW YORK CENTRAL RAILROAD COMPANY,
a corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a corporation,

Defendants.

Civ. Case No. 543.

Conclusions of Court.

The case of Yazoo vs. Zemurray, 238 Fed. 789, is in point on the demurrer in this case, concerning jurisdiction. This being a decision of the Circuit Court of Appeals, and the other cases cited being simply decisions of the district courts, it seems to me it is my duty to follow the Yazoo case. Besides, it seems to me to be based upon reason.

The plaintiff's attorney announced during the argument that he would not amend the complaint. The demurrer, therefore, will be sustained without leave to amend.

OSCAR A. TRIPPET.

[Endorsed]: No. Civ. No. 543. In the District Court of the United States for the Southern District of California. New York Central Railroad Company,

a corporation, plaintiff, vs. Mutual Orange Distributors, a corporation, defendant. Conclusions of court. Filed Jul. 18, 1917. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy clerk. Oscar A. Trippet, judge.

In the District Court of the United States, Southern District of California, Southern Division.

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corporation,

Defendant.

No. 543 Civil.

Petition for Writ of Error.

The New York Central Railroad Company, a corporation, plaintiff in the above-entitled cause, feeling itself aggrieved by the judgment of the court entered on July 21st, 1917, comes now, by Robert Brennan, its attorney, and files herein an assignment of errors, and petitions said court for an order allowing said plaintiff to procure a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said writ of error.

And your petitioner will ever pray, etc.

Dated August 2nd, 1917.

E. W. CAMP,

U. T. CLOTFELTER,

ROBERT BRENNAN,

Attorneys for Plaintiff.

[Endorsed]: Original. No. 543 Civil. In the District Court of the United States in and for the Southern District of California, Southern Division. The New York Central R. R. Co., a corporation, plaintiff, vs. Mutual Orange Distributors, a corporation, defendant. Petition for writ of error. Received copy of the within petition for writ of error this 3rd day of August, 1917. L. M. Chapman and Ward Chapman, attorney for Filed Aug. 3, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. E. W. Camp, Paul Burks, U. T. Clotfelter, M. W. Reed, Robert Brennan, Kerckhoff Building, Los Angeles, California, telephone: Main 2980, attorneys for plaintiff.

In the District Court of the United States, Southern District of California, Southern Division.

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corporation,

Defendant.

No. 543 Civil.

Assignment of Errors.

Comes now The New York Central Railroad Company, a corporation, plaintiff in the above-entitled cause, and files the following assignment of errors, upon which it will rely in its prosecution of a writ of error in the above-entitled cause, petition for which said writ of error to review the judgment of the Honorable District Court of the United States for the Southern District of California, Southern Division (hereinafter for the sake of brevity styled the trial court), made and entered in said cause on the 21st day of July, 1917, is filed at the same time as this assignment.

ASSIGNMENT I.

That the trial court erred in sustaining generally defendant's demurrer to plaintiff's complaint, and in ordering the dismissal of plaintiff's action.

ASSIGNMENT II.

That the trial court erred in sustaining the defendant's demurrer to plaintiff's complaint on the ground that said complaint does not state facts sufficient to constitute a cause of action against the defendant because the complaint contains appropriate allegations of the acts of the defendant in delivering to The Atchison, Topeka and Santa Fe Railway Company a corporation, for transportation, in interstate commerce, over the lines of that company's railway and its connecting lines, including this plaintiff's line of railway, the three hundred and forty-eight (348) boxes of oranges, and of the failure and refusal of defendant to pay the freight, refrigeration, car service charges

and other lawfully published tariff charges therefor (notwithstanding said oranges, at the special instance and request of the defendant, and in accordance with the agreement in writing evidence by a bill of lading, a copy whereof is attached to the complaint and made a part thereof, and pursuant to its several diversion orders, were transported from Cucamonga, California, to New York City), which the plaintiff was (and is) legally bound to collect under the constitution and laws of the United States, and in accordance with that certain act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce," and acts amendatory thereof and supplemental thereto, by reason whereof plaintiff's complaint states facts sufficient to constitute a cause of action against the defendant, and the first ground of said demurrer should have been overruled.

ASSIGNMENT III.

That the trial court erred in holding it had no jurisdiction of plaintiff's action on the ground that no federal question was involved, or that no diversity of citizenship existed as to confer jurisdiction, because it affirmatively appears by the allegations of the complaint that plaintiff's suit is brought to recover freight charges on an interstate shipment, and is a suit to enforce a right of action created by a federal law, and is a suit which clearly arises under the Interstate Commerce Act (Act of February 4, 1887, c. 104, 24 Stat. 379), Sec. 24, Subd. 8, 36 Stat. 1092 (Comp. St. 1916, Sec. 991, Subd. 8), giving the United States District Court original jurisdiction of suits and proceedings arising under any law regulating commerce, and there-

fore, the trial court had jurisdiction over the parties to and the subject-matter of the action irrespective of the amount in controversy or the citizenship of the parties, and should have so held.

ASSIGNMENT IV.

That the trial court erred in holding that plaintiff's complaint is uncertain, or that it cannot be ascertained therefrom whether or not it is claimed that the defendant contracted to pay the freight or other charges sought to be recovered by an express contract in writing, or whether it is claimed that such promise arose out of a parol agreement or by operation of law, and in sustaining defendant's demurrer on that ground, because the duty of the carrier to charge and collect the regularly established and published rate, and the corresponding obligation of the shipper to pay the same, regardless of any understanding, agreement, or other act of the parties, arises out of the provisions of the Interstate Commerce Act (Act of February 4, 1887, c. 104, 24 Stat. 379) and acts amendatory thereof and supplemental thereto, upon which plaintiff's said complaint is predicated.

ASSIGNMENT V.

That the trial court erred in holding that plaintiff's complaint is uncertain in that it cannot be ascertained therefrom to whom defendant agreed to pay freight charges on the shipment in said complaint described, and in sustaining said demurrer on that ground, for the reason and because the bill of lading attached to and forming a part of the complaint (covering an interstate shipment) fixes the extent of the obligations of the defendant and all participating carriers in so

far as the terms of said bill of lading are applicable, and because, under the Interstate Commerce Act, it became the duty of the plaintiff as the delivering carrier to institute this action for the purpose of recovering all lawful freight and other charges due and owing from the defendant on account of said shipment of oranges.

ASSIGNMENT VI.

That the trial court erred in holding that the plaintiff's complaint is uncertain in that it cannot be ascertained therefrom with whom it is claimed defendant contracted both for the shipment of the goods and the payment of freight, and in sustaining defendant's demurrer to the complaint on that ground, because, under the Interstate Commerce Act (Act of February 4, 1887, c. 104, 24 Stat. 379), a shipper who induces a railroad company to transport a shipment of freight in interstate commerce is liable for the lawful freight and other proper charges thereon, and any participating carrier may bring an action to recover such lawful freight charges.

ASSIGNMENT VII.

That the trial court erred in holding that the cause of action set forth in plaintiff's complaint is barred by the provisions of Subd. 1 of Sec. 338 of the Code of Civil Procedure of the State of California, and also by the provisions of Subd. 1 of Sec. 339 of said code, and in sustaining said demurrer on that ground, for the reason that plaintiff's said cause of action is one to recover the freight charges on an interstate shipment arising under the constitution and laws of the United States, in accordance with the terms and pro-

visions of an act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce," and acts amendatory thereof and supplemental thereto, and pursuant to a written contract evidence by a bill of lading, a copy whereof is attached to said complaint, marked Exhibit "A," expressly referred to and made a part thereof, bearing date January 23, 1913, executed with the state of California; that if the time for the commencement of such action is controlled by the statute of limitations of the state of California, then by the provisions of Subd. 1 of Sec. 337 of the Code of Civil Procedure of that state, an action upon any such contract, obligation or liability may be commenced within four years after such cause of action accrues, and further, because this action was commenced within four years from the 23rd day of January, 1913, to-wit: January 20th, 1917.

ASSIGNMENT VIII.

That the trial court erred in giving and entering judgment of dismissal of plaintiff's action for each and all of the reasons stated in the foregoing assignment of errors, which, by reference, are made a part hereof to the same extent as if incorporated at length herein.

And, upon the foregoing assignment of errors and upon the record in said cause, the plaintiff prays that said judgment may be reversed.

E. W. CAMP,
U. T. CLOTFELTER,
ROBERT BRENNAN,

Attorneys for Plaintiff.

[Endorsed]: Original. No. 543 Civil. In the Dis-

trict Court of the United States in and for the Southern District of California, Southern Division. The New York Central R. R. Co., a corporation, plaintiff, vs. Mutual Orange Distributors, a corporation, defendant. Assignment of errors. Received copy of the within assignment of errors this 3rd day of August, 1917. L. M. Chapman and Ward Chapman, attorney for deft. Filed Aug. 3, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. E. W. Camp, Paul Burks, U. T. Clotfelter, M. W. Reed, Robert Brennan, Kerckhoff Building, Los Angeles, California, telephone: Main 2980, attorneys for plaintiff.

In the District Court of the United States, Southern District of California, Southern Division.

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corporation,

Defendant.

No. 543 Civil.

Order Allowing Writ of Error.

Upon motion of E. W. Camp, U. T. Clotfelter, and Robert Brennan, attorneys for plaintiff, and upon filing a petition for writ of error and an assignment of errors,—

It is ordered that a writ of error be and the same hereby is allowed to have reviewed in the United

States Circuit Court of Appeals for the Ninth Circuit,
the judgment heretofore given and entered herein.

Dated August 3rd, 1917.

OSCAR A. TRIPPET,
District Judge.

The defendant consents to the foregoing order without requiring an undertaking or security from the plaintiff.

L. M. CHAPMAN,
WARD CHAPMAN,

Attorneys for Defendant.

[Endorsed]: Original. No. 543 Civil. In the District Court of the United States in and for the Southern District of California, Southern Division. The New York Central R. R. Co., a corporation, plaintiff, vs. Mutual Orange Distributors, a corporation, defendant. Order allowing writ of error. Received copy of the within order allowing writ of error this 3rd day of August, 1917. L. M. Chapman and Ward Chapman, attorneys for defendant. Filed Aug. 3, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. E. W. Camp, Paul Burks, U. T. Clotfelter, M. W. Reed, Robert Brennan, Kerckhoff Building, Los Angeles, California, telephone: Main 2980, attorneys for plaintiff.

38 *The New York Central Railroad Co. vs.*

*In the District Court of the United States, Southern
District of California, Southern Division.*

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corporation,

Defendant.

No. 543 Civil.

Praecipe for Transcript of Record.

To the Clerk of the Above-Named Court:

Please issue a certified copy of the record in the above-entitled cause, consisting of the papers following:

1. Complaint.
2. Demurrer.
3. Judgment Roll.
4. Petition for Writ of Error.
5. Assignment of Errors.
6. Order Allowing Writ of Error.
7. Writ of Error.
8. Citation in Error.

Said record to be certified under the hand of the clerk and the seal of the above court.

Dated August , 1917.

ROBERT BRENNAN,

Attorney for Plaintiff.

[Endorsed]: Original. No. 543 Civil. In the District Court of the United States in and for the Southern District of California, Southern Division. The

New York Central R. R. Co., a corporation, plaintiff, vs. Mutual Orange Distributors, a corporation, defendant. Praeclipe for transcript of record. Filed Aug. 3, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. E. W. Camp, Paul Burks, U. T. Clotfelter, M. W. Reed, Robert Brennan, Kerckhoff Building, Los Angeles, California, telephone: Main 2980, attorneys for plaintiff.

*In the District Court of the United States, Southern
District of California, Southern Division.*

THE NEW YORK CENTRAL R. R. CO., a Corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corporation,

Defendant.

No. 543 Civil.

I, Wm. M. Van Dyke, clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing thirty-nine (39) printed pages, numbered from 1 to 39, inclusive, to be a full, true and correct transcript of the record of the District Court of the United States of America, in and for the Southern District of California, Southern Division, in the above and therein entitled suit, as the same was prepared and caused to be printed by the appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this day of, in the year of our Lord one thousand nine hundred and seventeen, and of our independence the one hundred and forty-second.

(Seal) WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By, Deputy Clerk.